No. 80-795

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MICHAEL HEFFRON, Secretary and Manager of the Minnesota State Agricultural Society Board of Managers, et al.,

Petitioners,

—v.—

INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, THE MINNESOTA CIVIL LIBERTIES UNION, AND THE NATIONAL COUNCIL OF CHURCHES, *AMICI CURIAE*

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INTEREST OF AMICI CURIAE*

The American Civil Liberties Union (the "ACLU") is a national, non-partisan, non-profit membership organization dedicated to protecting personal liberty through a vigorous defense of the safeguards embodied in the Bill of Rights. Since our founding in 1920 we have appeared before this Court, either as counsel or amicus, on more than one thousand occasions in support of those safeguards. We have been particularly concerned with preservation of freedom of speech and free exercise of religion, both of which are at issue here.

The ACLU is especially concerned that those principles are threatened by the positions advocated by the Petitioners, by the State of Minnesota, by the states which are participating as amici in this action, and

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* Letters of consent are being lodged with the Clerk.

by the many states, districts and counties which have enacted booth rules which curtail the dissemination of ideas.

The National Council of Churches in the United States of America is the cooperative agency of thirty-two Protestant and Eastern Orthodox national religious bodies with an aggregate membership of over 40,000,000. It is deeply interested in the First Amendment rights of religious bodies and other organizations to both solicit funds from the public and purvey their message with minimal regulation by government.

For these reasons, the ACLU, the Minnesota Civil Liberties Union, an ACLU state affiliate, and the National Council of Churches respectfully urge this Court to uphold the judgment of the Minnesota Supreme Court that the booth rule is an unjustified and impermissible infringement of First Amendment rights as applied to members of ISKCON (and other religious, political or civic groups) who attempt to distribute and sell non-commercial literature to, or solicit contributions from, visitors to state fairs.

SUMMARY OF ARGUMENT

The Minnesota "booth rule" prohibits the sale or distribution of any literature on the Fairgrounds except at a rented booth, and has been interpreted by Fair officials and the Ramsey County District Court to prohibit the solicitation and collection of donations except at such booths. (Joint Appendix [hereinafter "J.A."] 60-62.) As applied to political and civic groups, or to religious groups like ISKCON, the booth rule is, and was held by the Minnesota Supreme Court to be, an unconstitutional infringement on freedom of speech and the free exercise of religion. ISKCON v. Heffron, 229 N.W.2d 79 (1980) (J.A. 58).

The fairgrounds are a public forum where First Amendment activities cannot be prohibited, and can only be regulated if they are truly incompatible with the forum's

function and the regulation is necessary to advance a substantial or compelling state interest. The distribution and sale of religious literature and the solicitation and collection of contributions have long been recognized as activities having the full protection of the First Amendment, and are clearly compatible with the purpose of the State Fair. There is no governmental interest that justifies their curtailment at the Fair.

The booth rule is hardly a reasonable regulation of the place and manner in which the distribution of religious literature and the solicitation of contributions can be pursued. Rather, it is in its effect an unconstitutional abridgement of these First Amendment activities because it greatly diminishes the amount, opportunities for and effectiveness of such activities, and

substantially increases their cost. Since the rule amounts to a prohibition, it is unconstitutional.

Even if viewed as a regulation of the place in which the distribution of literature and solicitation of contributions may be conducted (so as to invoke a balancing test) the record shows that the speculative impact of these activities on the four interests the state allegedly seeks to advance through their curtailment is not supported by any evidence. Furthermore, those interests are grossly overstated or impermissible. The maintenance of order and safety is not jeopardized by roving solicitors; the protection of fairgoers from unwanted communications is not a legitimate state concern and is an infringement on the rights of fairgoers to receive communications; the rights of other

exhibitors are not undercut by recognizing that First Amendment activities are exempt from the booth rule; and the prevention of fraud and deceptive conduct -- in fact, the prevention of all these problems -- is more efficiently and directly accomplished by means less restrictive of First Amendment freedoms.

The booth rule severely injures ISKCON and groups similarly situated. Contributions from non-members are their lifeblood; and the State Fair offers an unequalled opportunity to contact and solicit a large number of people who are in an ideal frame of mind to purchase their literature and make contributions -- if itinerant solicitations were permitted. On balance, the harm sustained by such groups far outweighs whatever administrative convenience is achieved by this overbroad rule.

I. THE BOOTH RULE SEVERELY ABRIDGES THE EXERCISE OF FIRST AMENDMENT RIGHTS IN AN IMPERMISSIBLE MANNER.

A. The Distribution And Sale Of Religious Literature And The Solicitation And Acceptance Of Contributions Are Protected By The First Amendment.

The booth rule, Minnesota State Fair Rule 6.05, is clearly unconstitutional as applied to prohibit the itinerant sale and distribution of literature and the solicitation of contributions by ISKCON and other religious and political groups at the Minnesota State Fair (hereinafter "the Fair"). The booth rule may also be facially unconstitutional, but amicus herein challenges only its application to non-commercial groups and their protected activties.

Although there is no dispute that Sankirtan is a bona fide religious ritual of the Krishna Consciousness branch of the

Hindu religion,[1] this Court's decision need not turn on that narrow ground. Nor does amicus argue that ISCKON members should receive a preferential exemption from the booth rule solely because the distribution and sale of literature and the solicitation of contributions may be requirements of Sankirtan. Instead, we urge that this Court apply its long-standing and unequivocal holdings that any religious or political organization possesses, as an indivisible concomitant of its right to advocate its views under the protection of the First Amendment, the right to distribute and sell literature settling forth its beliefs and to solicit

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1 Stipulation of Facts, J.A. 31. Also, other courts have uniformly so held. See, e.g., Edwards v. Maryland State Fair, 628 F.2d 282, 284 (4 Cir. 1980); ISKCON v. Bowen, 600 F.2d 667, 669 (7th Cir. 1979); ISKCON v. State Fair of Texas, 461 F. Supp. 719, 723 (N.D. Tex. 1978); United States v. Silberman, 464 F. Supp. 866, 870 (M.D. Fla. 1979); ISKCON v. City of New Orleans, 347 F. Supp. 945, 947 (E.D. La. 1972).

and receive financial support for its maintenance and the propagation of those beliefs.

This Court has clearly held that the distribution of literature is protected by the First Amendment, Schneider v. State, 308 U.S. 147, 162-164 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938); Jamison v. Texas, 318 U.S. 413, 416 (1943), and that the solicitation of contributions is also protected by the First Amendment, Cantwell v. Connecticut, 310 U.S. 296 (1940); Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980).

Common sense compels these holdings. Oral advocacy without the simultaneous distribution of supporting literature is frequently so incomplete or ineffective as to render the right of free expression a virtual nullity. A political action organization, for example, must have the right to distribute the voting records of incumbent candidates, because those facts can never

adequately be conveyed or retained by oral communication alone. A political candidate's most effective communication may well be a flyer featuring photographs of himself and his family. A right-to-life group may most persuasively make its point with pamphlets showing aborted fetuses. And a religion like Krishna Consciousness, based on teachings and principles quite foreign to Western ears, cannot be expected to communicate its message accurately or effectively without the distribution of literature, much of it in the lengthy book format necessary to encompass the broad scope and intense depth of the religion.[2] Murdock v. Pennsylvania, 319 U.S. 105, 108-9 (1943):

> The hand distribution of religious tracts is an age old form of missionary evangelism -- as old as the history of

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2 The principal Vedic scriptures include Upanishads; Mahabharata; Bhagavad-Gita; Vedanta-sutra; Srimad Bhagaratam; and Sri-Caitanya-Caritamatra, (J.A.-13).

> printing presses. It has been a potent force in various religious movements down through the years. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the more the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press. (footnotes omitted)

In addition to distributing religious literature to fairgoers, it has been stipulated that ISKCON devotees desire to solicit contributions and/or sell such literature (J.A. 33), but this in no way undercuts the claim to full First Amendment protection. ISKCON can not be required to give away literature without charge as the price for preserving its First Amendment rights. Murdock v. Pennsylvania, 319 U.S. at 111:

> But the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise...The constitutional

rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books... It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist...does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.

B. The State Fair Is A Public Forum, And Speech And Solicitation Activities Are Compatible With Its Purpose.

Petitioners improperly conclude that the Fair is a much less suitable forum than streets and parks for the communication of ideas. Petitioners' Brief (hereinafter P.B.) 22-23. Amicus contends that the Fair is an ideal forum for such communication, even more so in many respects than some streets and parks.

This Court has often indicated that a preliminary question is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." Grayned v. City of Rockford, 408 U.S. 104, 116 (1972). Thus, expressive activity can be restricted only if it materially disrupts the purpose of the forum or involves substantial disorder or invasion of the rights of others. Tinker v. Des Moines Independent Community School

District, 393 U.S. 503, 513 (1969). The nature of a place, "the pattern of its normal activities, dictates the kind of regulations of time, place, and manner that are reasonable." Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1042 (1969). Cf. Cox v. Louisiana, 379 U.S. 536 (1965); Adderley v. Florida, 385 U.S. 39 (1966); Amalgamated Food Employees v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Greer v. Spock, 424 U.S. 828 (1976).

The First Amendment activities here at issue are as fully compatible with the nature and purpose of state fairs as they are with the purpose of streets and parks -- and possibly even more compatible.

One of the most thoughtful judicial analyses of "the primary uses of streets and parks," undertaken in an attempt to "reconcile the interest in allowing free expression of ideas in public places with the protection of public peace," is contained in Justice

Frankfurter's concurring opinion in Niemotko v. Maryland, 340 U.S. 268, 273-289 (1951). Frankfurter concluded that the primary purpose of streets was for "passenger and vehicular traffic," 340 U.S. at 282,[3] and that parks served "the recreational, esthetic and contemplative needs of a community," id. at 283. Arguably, those primary purposes of parks and streets could, under some circumstances, be deemed less than fully compatible with speech-making, proselytizing, distribution of literature, and solicitation of contributions; yet, "time out of mind, [parks and streets] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U.S. 496, 575 (1939).

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[3] Cf. Schneider v. State, 308 U.S. 147, 160 (1939) ("movement of people and property, the primary purpose to which streets are dedicated").

Fairs are even more compatible with First Amendment activity. The primary use of a fairgrounds is neither for travel nor relaxation of the contemplative, pastoral sort one seeks in a park, but to host an annual, statewide marketplace and exhibition for the enlightenment and entertainment of the public. A fair is a marketplace for agricultural produce, souvenirs, handicrafts, amusements and also ideas, an exhibition where livestock and needlework can peacefully co-exist with political candidates and religious literature. It is -- and is understood by those who attend to be -- a once-a-year opportunity to escape from one's routine, sample unfamiliar foods and ideas, meet people and see things one would not otherwise encounter, and be confronted with concepts -- whether agricultural, technological,

political, educational or religious -- which one would also not likely otherwise encounter.

> A fair is almost by definition a congeries of hawkers, vendors of wares and services, and purveyors of ideas, commercial, esthetic and intellectual.

ISKCON v. State Fair of Texas, 461 F. Supp. 719, 721 (N.D. Texas 1978). A fair is thus an emminently suitable public forum for the activities here at issue.

Also, one goes to a fair, as petitioners have acknowledged, intending to linger for a large part of the day, (P.B. 21). A fairgoer is not rushing to catch a plane, as at an airport, or late for work, or concentrating on traffic as one is on city streets. Nor does one go to a fair expecting peace and solitude as one might at a park. A fairgoer is uniquely receptive, if not to the particular message preached by a devotee of ISKCON or other First Amendment groups, at least to being approached by them. (J.A. 11). Their attempt to com-

municate their views and sell their literature are neither a serious intrusion on the fairgoer's time, an invasion of his home, an impediment to his travel, or a threat to his safety, nor are they perceived as such by the average fairgoer. Ewert Affdt., J.A. 42.

Since their inception, fairs have been regarded and functioned as ideal places for the interchange of ideas as well as merchandise. The ancient Greeks and Romans used the days of fairs and markets to announce new public laws. In early Christian times fairs were frequently attached to religious gatherings, especially those of pilgrims coming to a town to celebrate a special feast. The great fairs of Europe -- Geneva, Antwerp, Leipzig, Madrid, Lyons, Bordeaux, Novgorod -- served as effective conduits for both goods and ideas from distant lands as well as between the nations of the Continent. In the 17th century, trade fairs to a large extent were replaced by pleasure fairs which

were dominated by entertainments often conveying ideas through the medium of plays. See Helen Augur, The Book of Fairs (1939); William Addison, English Fairs and Markets (1953); Sybil Rosenfeld, The Theater of the London Fairs in the 18th Century (1960); "Fairs", The Columbia Encyclopedia (3d Ed. 1963).

Thus, the attempt by means of the booth rule to prohibit the full communication of ideas in the mainstream of the fair deprives fairgoers of their constitutional right to hear, read, judge, and support various philosophies, and removes from the fair what has historically been one of its most important functions.

C. The Booth Rule Is, In Effect, An Unconstitutional Prohibition On The Meaningful Exercise Of First Amendment Rights.

Petitioners argue that they have not denied ISKCON or other groups access to the fairgoers, but have merely required that solicitations and sales of literature be made from booths. The Fair terms this a "regulation" rather than a "prohibition", but -- and this is the heart of the matter -- when a regulation of time, place, or manner severely curtails the effective exercise of First Amendment rights, that regulation becomes tantamount to a prohibition. "Free expression 'must not, in the guise of regulation, be abridged or denied'." Grayned v. City of Rockford, 408 U.S. 104, 117, quoting Hague v. CIO, 307 U.S. at 516.

Regulations, for example, which would permit literature sales on village streets

only between midnight and 4:00 a.m., or which would confine religious solicitations to the warehouse district of a city, or forbid oral advocacy above a whisper, although ostensibly only "regulations" of time, place, or manner, would surely be struck down as the equivalent of prohibitions because they obviously deprive the speaker of meaningful access to the vast majority of the populace. The booth rule so drastically reduces the opportunity for and the effectiveness of First Amendment activity that it amounts to a de facto prohibition on such activity and, hence, is constitutionally impermissible:

> Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots.

Tinker, supra, 393 U.S. at 513.

As one of the federal courts which

carefully studied the impact of a similar booth rule on the solicitation activities of the Krishnas and Sankirtan observed:

> It involves a one-to-one exchange. It cannot be exercised from a 30-foot booth with any degree of effectiveness -- not when the fair grounds sprawl over approximately 250 acres.

ISKCON v. State Fair of Texas, 461 F. Supp. 719, 723 (N.D. Texas 1978).

The booth rule seriously diminishes the effectiveness of solicitations and the ability to perform Sankirtan in the following ways:

First, under the most ideal conditions, only a minute percentage of the fairgoers could be accommodated at an ISKCON booth, Beca Affdt. J.A. 12, and the expense of additional booths would be considerable. (On costs, see Exhibit to Affidavit to Michael Heffron, J.A. 49-52.)

Second, it is not realistic, given the natural diffidence of people when dealing with foreign cultures, to expect many fair-

goers to seek out the booth of ISKCON or any similarly unconventional organization.

Third, even when more than idly curious about a group like ISKCON, many individuals are reluctant to be seen to approach a booth and initiate contact for fear that neighbors, co-workers, or other observers will conclude that the individual "supports" or "believes in" that group. In contrast, when it is the group which initiates the approach, the curious individual has a reasonable "excuse" for maintaining the contact sufficiently long to satisfy his curiosity (or whet his appetite for more) but without appearing to observers to be anything other than polite.

Fourth, one can purchase a book or make a donation after being solicited by an itinerant devotee of a group like ISKCON without being perceived by others as a supporter of that group. Observers may assume the purchase or donation was made on a charitable impulse or to get rid of the solici-

tor; either motive will be respected and thus make it easier for the individual to contribute. But the act of approaching a booth to purchase a book or make a contribution cannot be similarly explained away, and potential contributors may refrain from so doing for fear of being stigmatized as supporters of such a group.[4]

The Court recognized these human tendencies in Lamont v. Postmaster General, 381 U.S. 301, 307 (1965) when it criticized the "deterrent effect" and inhibition caused by requiring one to whom communist political propaganda was addressed to take affirmative measures to receive it.

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4 It is obvious that the diminished opportunity for effective solicitation caused by factors 2, 3, and 4 is not operative in the commercial context; and for that reason the booth rule is not truly content-neutral in operation, having a far greater impact on groups like ISKCON than on more "establishment" groups or commercial vendors.

Fifth, people are often reluctant, even when curious, to make inquiries at a fair booth for fear that it will obligate them to make a purchase or contribution; they do not feel a similar obligation when the solicitor approaches them and are thus more likely to communicate openly and learn more about the beliefs of the solicitor's organization.

Sixth, and without getting into the complex issue of whether the Krishna Consciousness religion requires its devotees to perform the solicitation and book-distribution activities of Sankirtan peripapetically,[5] it is nevertheless obvious that the booth-bound method is inappropriate for a group like ISKCON because the method is

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5 Amicus believes that such inquiry is not necessary to invalidate the rule and that this case should not turn on whether ISKCON members have a "special claim" to an exemption from the booth rule.

(Footnote Continued)

inconsistent with the message, and such inconsistency may confuse or offend prospective converts and supporters. The message of an active, proselytizing religious sect

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5 (Footnote Continued)

What is at issue here, is not that the Krishnas should be allowed to solicit throughout the Fair because their religion requires it, but that they, and all others advocating religious or political positions, should be permitted to do so because they are entitled under the First Amendment to present their beliefs to the public in a meaningful way. It is unclear whether the Minnesota Supreme Court found the peripatetic requirement of Sankirtan essential to its decision, because that finding appears in a foot note, (J.A. 69); but it is clear that judicial inquiry into religious beliefs and motivation is constitutionally impermissible. United States v. Ballard, 322 U.S. 78 (1944). Inquiry into this "forbidden domain", id. at 82, would open the door to the undesirable prospect of having non-believers adjudicate the validity, scope and meaning of sacred doctrines, and unnecessarily subject this religious movement to the scornful, cynical, abusive and offensive characterizations contained in the amicus briefs submitted to this Court by the States of Ohio (pp. 18-22) and New York (pp. 18-27) and the County of Los Angeles (pp. 8-17).

which believes it has "a duty . . . to benedict everyone . . . with this sublime vision of Vedic knowledge that leads back to the Godhead," Beca Affdt. J.A. 20, is most appropriately conveyed in an active, direct manner, as by peripatetic devotees seeking out and contacting the unenlightened face-to-face, rather than in the diffident, less urgent manner conveyed by the use of a booth. See, e.g. K. Longman, Advertising, (New York: Harcourt Brace, 1971) p.206.

These considerations, although not capable of precise statistical measurements, are nevertheless real, operative, and far from fanciful. Each acts to a greater or lesser degree on every visitor to the Fair, and their net effect is to reduce drastically the number of fairgoers to whom ISKCON is able to convey its message and obtain financial support when its activities are confined to a booth. That drastic reduction

in actual -- as opposed to theoretical -- access amounts to a virtual prohibition.

It is apparently such drastic curtailment in access resulting from an otherwise permissible place regulation that was condemned in Young v. American Mini Theatres, 427 U.S. 50, 71 n.35 (1976). In the course of upholding an ordinance which regulated the location of adult theatres, the Court observed that "(t)he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech."

The regulation permitting proselytizing throughout the Fair but forbidding the transfer of money anywhere except at booths is also a virtual prohibition on effective solicitation because it is wholly unrealistic to expect a fairgoer to walk very far or battle the crowds to reach the ISKCON booth to make a donation or pay for a religious book. Many of these donations are made on

brief impulse. The enforced delay might have permissibly beneficial results in avoiding ill-conceived purchases of pots and pans and home freezers from door-to-door salesmen, but the state cannot require a "cooling off" period before a listener may respond to political or religious speech.

The Court has said it would uphold only that general regulation of religious solicitation which "does not unreasonably obstruct or delay the collection of funds," Cantwell, supra, 310 U.S. at 305. The obstruction and delay caused by the Minnesota booth rule are obvious. Such barriers to effective solicitation amount to a denial of the right to solicit, and a denial of that right is, for a group like ISKCON, a sentence to oblivion.

This Court has recognized that when an ordinance, although purportedly only regulating the time, place or manner of a communication, does so in a way which severely reduces the effectiveness of that communication or

greatly burdens its presentation, the regulation is tantamount to a prohibition and hence constitutionally impermissible, Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977).

In Linmark, the township had passed an ordinance forbidding homeowners to post "For Sale" signs on their property, and it argued that this regulation did not directly implicate First Amendment concerns because it restricted only one method of communication. This Court held that serious questions existed whether the ordinance "leave[s] open ample alternative channels for communication." The Court noted that although in theory sellers of homes remained free to employ different alternatives, in actual practice the options to which they were relegated "involve more cost and less autonomy" than For Sale signs, "are less likely to reach persons not deliberately seeking sales information," "and may be less effective

media for communicating the message." Linmark, supra, 431 U.S. at 93. The Court concluded that "(t)he alternatives, then, are far from satisfactory," id. and went on to strike down the ordinance.[6]

Similar considerations are clearly present in the instant action. Petitioners contend that, although ISKCON is not permitted to distribute or sell literature or solicit or accept contributions throughout the fairgrounds, it has the alternative of undertaking these activities from a fixed booth. We have shown, supra, that such alternative is "far from satisfactory," being burdensome, inappropriate, ineffective and relatively unproductive. The fixed booth method clearly involves "more cost and less autonomy" for ISKCON than the use of roving solicitors.

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6 The Court also observed that the township was not "acting to restrict a mode of communication that intrudes

(Footnote Continued)

The fixed booth is obviously "less likely to reach persons not deliberately seeking [Krishna] information." And the fixed booth also "may be less effective media for communicating the message".

If the Court agrees that the booth rule, in its effect, amounts to a prohibition of First Amendment activities as applied to ISKCON and similar, non-commercial groups, the Court must exempt them from its restrictions. Only if the Court regards the booth rule as a regulation, rather than a prohibition, need it proceed to weigh and balance the competing interests, infra, Point III.

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6 (Footnote Continued)

on the privacy of the home...or otherwise reaches a group the township had a right to protect" from the communication. Nor had it been shown that the place or manner of the communication produced a detrimental "secondary effect" on society, id. at 94. All these considerations, which could possibly justify a restriction, are also absent here.

II. NONE OF THE FOUR INTERESTS ASSERTED TO JUSTIFY THE BOOTH RULE IS SIGNIFICANTLY IMPLICATED BY THE ACTIVITIES OF ISKCON, AND EACH COULD BE SATISFIED BY LESS RESTRICTIVE MEANS.

Although amicus does not concede that the booth rule is content neutral or anything less than a prohibition as applied to ISKCON, if the Court disagrees and decides it appropriate to balance the interests involved, amicus accepts Petitioners' contention (P.B.15) that:

> (t)he balancing test required in non-content speech and free exercise cases is a weighing of the harm suffered by those whose speech or religious conduct is restricted against the governmental purposes served by the regulation.

Amicus has shown, Point I C, supra, and will demonstrate, Point III, infra, that the harm suffered by ISKCON from the booth rule is severe, far more so than can be justified by the state purposes allegedly served by it.

Amicus will accept, for purposes of this litigation, Petitioners' position regarding the appropriate standard of judicial review; Petitioners acknowledge that the governmental

> purposes must be 'substantial', 'significant', 'important', or 'compelling'. See Virginia State Board of Pharmacy v. Virginia Citizen Consumer Councel, 425 U.S. 748, 771 (1976); Grayned v. Rockford, supra, 408 U.S. at 115; United States v. O'Brien, 391 U.S. 367, 376-77 (1968); Lehman v. Shaker Heights, supra, 418 U.S. at 303. (P.B. 15.)

Amicus contends, and will demonstrate below, that the state interests actually served by the booth rule fail to meet any of these standards.

Furthermore, the booth rule is broader in scope and more restrictive of protected communication than is required to serve any of the asserted state interests. The State

> may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those

> interests without unnecessarily interfering with First Amendment freedoms.

Village of Schaumburg, 444 U.S. at 637.

> Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone.

NAACP v. Button, 371 U.S. 415, 438 (1963).

Where communication is infringed, "the regulation must be narrowly tailored to further the State's legitimate interest." Grayned, supra, at 116-117.

A. Maintenance of Order and Safety -- Is Not Jeopardized by ISKCON Solicitors.

The state's contention that the booth rule is required to effectuate its legitimate interest in crowd control and public safety is speculative and unpersuasive, Heffron Affdts., J.A. at 28 and 48, and nothing in the record indicates that the activities of ISKCON members have resulted or are likely to result in congestion or a threat to the public order. Also, notning in the reported experience of the Texas or Maryland State Fairs, where the application of the booth rule to ISKCON has been judicially enjoined, gives evidence of any increased congestion or disorder resulting therefrom. See, e.g., Dallas Morning News, Oct. 1-20, 1979 and Oct. 1-16, 1980; Baltimore Sun, Aug. 20 - Sept. 8, 1980.

Petitioners ask this Court to believe that the presence of several dozen itinerant solicitors from various organizations would intolerably or dangerously increase the congestion in a 45-acre area which already accommodates more than 115,000 fairgoers daily. (J.A. 35.) In view of the slow pace at which people travel in such congested surroundings, the Court cannot assume that the book-selling or change-making activities of ISKCON members would be incompatible with pedestrian movement or inimical to the public safety.

Since the Fair officials have stipulated that they permit itinerant oral proselytizers, it is difficult to comprehend what state interests in order and safety are served by the ban on the itinerant sale and distribution of literature and the acceptance of donations, because it is

difficult to imagine much increased disruption resulting therefrom. The Supreme Court of Minnesota, after a thorough examination of the record, found that

> We are not convinced that allowing ISKCON members to also distribute religious literature and accept money throughout public areas of the fairgrounds would cause additional disruption sufficient to justify confining those activities to a booth.

ISKCON v. Heffron, J.A. 64-65. And even the dissenters agreed that:

> There is no basis in the record for distinguishing the effect of proselytism from that of solicitation and distribution of religious literature on the claimed governmental interests involved herein . . . It would appear that the acts of solicitation and distribution have no greater impact on the public order than does the act of proselytism. Id., J.A. 70.

The Fourth and Seventh Circuits have rejected the congestion argument in very similar circumstances, Edwards v. Maryland State Fair, 628 F.2d 282, 286 (4th Cir. 1980); ISKCON v. Bowen, 600 F.2d 667, 669

(7th Cir.), cert. denied, 444 U.S. 963 (1979), as has the Supreme Court of Colorado, ISKCON v. Colorado State Fair, 610 P.2d 486, 489 (1980) (en banc). To our knowledge, no court considering a fair's booth rule has found the congestion argument dispositive.[7]

Since there is no evidence that activity of the kind proposed by respondents would measurably affect pedestrian congestion at the Fair, there is no basis for confining

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7 Confinement of solicitations to booths or fixed locations have been upheld on congestion rationale (although amicus does not concede their validity) in cases involving places like airports, ISKCON v. Eaves, 601 F.2d 809 (5th Cir. 1979), and the Word Trade Center, ISKCON v. McAvey, 450 F. Supp. 1265 (S.D.N.Y. 1978), but as the Minnesota Supreme Court correctly observed in refusing to confine ISKCON's solicitation to a booth, "(t)he state fair is not equivalent in character to the World Trade Center. Nor is it equivalent to an airport." J.A. 10.

it to a booth. The booth rule cannot be justified by speculation. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Tinker, supra, 393 U.S. at 508.

Furthermore, "(t)idiness and tranquility are not qualities ordinarily found at fairs, nor are they qualities enshrined in the First Amendment." Edwards, supra, 628 F.2d at 286.

This case involves only a few dozen devotees of a peaceful religious movement (J.A. 14-18, 23, 41) who seek to walk about and to distribute religious literature and solicit contributions. It is stipulated that the Krishnas do not propose to chant, dance or sing outside their booth or engage in any "disruptive or disorderly conduct." Stipulation of Facts, J.A. 33-34. The Fair is not confronted here with any activities

this Court has ever held sufficiently disruptive of public order or safety to justify abridgement.[8]

The proper way for the Fair to protect public order and safety is to direct its regulation at the act of obstruction itself, eliminate instances of congestion or disorder as they arise, and prosecute those who cause them.

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8 The solicitation and booth distribution activities of ISKCON do not interfere with or obstruct the administration of justice, Cox v. Louisiana, 379 U.S. 559 (1965); or prevent ingress to or egress from a courthouse or its equivalent, Cameron v. Johnson, 390 U.S. 611 (1968); nor are they likely to "inflict injury or tend to incite an immediate breach of the peace," Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Nor are we dealing with large, organized formations of people creating possible safety problems on a public highway, Cox v. New Hampshire, 312 U.S. 569 (1941).

B. Protecting Fairgoers from Unwanted Communications -- Is Not A Constitutionally Cognizable State Concern.

Petitioners express a paternalistic though doubtlessly sincere desire to shield fairgoers from contact with ideas and communications they do not seek and may not regard with favor. But the Fair has no power to shield its visitors from consitutionally protected advocacy, even if it is upsetting or unwanted. Moreover, citizens can claim no privacy or other right which entitles them to be free from being approached in public places. See Village of Schaumburg, supra, 444 U.S. at 638-39. In fact, citizens have an absolute right to have all ideas communicated to them so that they may judge their merits.

> The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom

> which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, Lovell v. Griffin, 303 U.S. 444, 452, and necessarily protects the right to receive it. (Footnote omitted.)

Martin v. Struthers, 319 U.S. at 143.

The individual has the right to determine whether he is willing to receive the message, and any regulation or ordinance which endeavors to substitute the judgment of the community for that of the individual is invalid, id. at 144.

The recognized exceptions, none of which are applicable here, occur when the speaker attempts to invade the sanctity of the home against the expressed wish of the resident, e.g., Rowan v. United States Post Office Department, 397 U.S. 728, 738 (1970), or where the hearer is part of a captive audience, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (passengers

on city buses). In an area as open as a street, park or state fair, there is no captive audience, for the unwilling listener is clearly capable of ignoring the speaker and continuing on his way.[9] "The crowds are not captive but move freely to those places and booths they choose." ISKCON v. State Fair, 461 F. Supp. at 721.

Expectations of privacy at a fair are slight at best since they run counter to the very nature of a fair. Furthermore, whatever intrusion on such interests is experienced by an unwanted solicitation, it surely does not rise to the level of the

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9 Arguably, should this be insufficient for very sensitive individuals or those who feel harrassed by repeated solicitations, they could wear a button or paste-on badge saying "No Solicitation," and violators of such request could conceivably be punished, per this Court's suggestion in Martin v. Struthers, 319 U.S. at 147-149.

"essentially intolerable" invasion which this Court deemed requisite to enable a government to "shut off discourse solely to protect others from hearing it." Cohen v. California, 403 U.S. 15, 21 (1971).

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

Martin v. Struthers, 319 U.S. at 146-147.

In Farmer v. Moses, 232 F. Supp. 154, 162 (S.D.N.Y. 1964), the court considered the privacy rights of visitors to the New York World's Fair and concluded:

> [T]hose of us who pay the regular admission fee and attend the Fair cannot be totally insulated from our

> fellows, nor can we expect to be shielded from expressions or ideas which are unanticipated and unsolicited. An individual's right of privacy is of practical necessity limited by the rights of others when he leaves his home and ventures forth into public areas, even those which he must pay to enter.

The rule that the State must not interfere with the communication of unwanted ideas is profoundly important because many of the principles most cherished by the majority of Americans today -- the freedom from the control of foreign kings preached by Tom Paine, the end of slavery demanded by the abolitionists, the right of women to vote, America's emergence from isolationism to world leadership, Social Security, and even freedom of speech and religion -- were at their inception largely unwanted communications and unsettling ideas which initially found few willing listeners and which, had their advocates been confined to the

back booths instead of being permitted vigorously and aggressively to seek out supporters, might never have endured to bestow their benefits upon us.

C. The Rights Of Other Exhibitors -- Are Not Undercut By Barring Application Of The Booth Rule To First Amendment Groups.

Petitioner's concern with protecting the rights of "competing" exhibitors and concessionaires (P.B. 18-21) by forbidding itinerant solicitation is speculative, overstated, and not supported by any evidence. If this Court enjoins the application of the booth rule to ISKCON, then all groups similarly situated will have the right to solicit peripatetically, and none of them will be placed at a "competitive" disadvantage. On the other hand, many such groups will not necessarily avail themselves of the right,[10] thus eliminating

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10 Some may refrain because they prefer the "prestige" and propriety of a fixed booth, others because their message or mission is such that those fairgoers favorably disposed to receive it will

(Footnote continued)

the spectre of hundreds of shouting solicitors simultaneously competing for the ear and purse of the same fairgoer.

The groups which elect not to engage in peripatetic advocacy will not be placed in an inferior competitive position by permitting ISKCON to do so, as the Fair claims, for the hungry mind is uniquely capable of accommodating both a large and varied intellectual diet. The fact that a fairgoer has received a copy of Back to Godhead magazine from a peripatetic Krishna will not preclude him from accepting, reading, and possibly being persuaded by an evangelical tract from the Minnesota Conference of Seventh Day Adventists, the Twin Cities Baptist Messianic Witness, the Lutheran

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10 (Footnote Continued)

seek them out, others because they traditionally do not seek donations or converts.

Colportage Service, or other groups represented at the Fair (List of Exhibitors, J.A. 49-52). But if groups which seek donations find the amounts have dropped because an itinerant Krishna devotee got there first, those groups have the right to use similar itinerant solicitations.

It is not even arguably likely that an encounter with a roving Krishna or member of any other group enjoying full First Amendment rights will prevent a fairgoer from giving his full due to the commercial exhibitors and concessionaires at the Fair or from visiting the "agriculture, horticulture, stockbreeding, manufacturers, and the mining, mechanical and industrial arts and sciences," the Fair promotes, Minn. Stat. § 37.15 (1980).

Should any itinerant proselytizers prove a problem in blocking access to an

exhibitor's booth, the Fair could easily enact a rule prohibiting solicitation which interferes with such access, a rule far less restrictive of First Amendment rights and narrowly drawn to protect the legitimate interests involved.

D. Prevention Of Fraud And Deceptive Conduct -- Is Best Accomplished By Criminal Prosecutions, Not By Severe Restraints On First Amendment Activity.

Out of a total of 1,320,000 Minnesota State Fair attendees in 1979, Petitioners, despite extensive attempts (Affidavits of Beca, J.A. 38, Kerr, 80, and Ewert, 43), were able to obtain only four signed affidavits from people complaining about the activities of ISKCON members (J.A. 53-58), and only one of those, that of Michael Gene Krogness (J.A. 53), arguably approaches a

misrepresentation claim.[11]

At most, the complaints obtained by Petitioners indicate some over-zealous solicitation and impolite conduct and perhaps one instance of possible misrepresentation by an ISKCON member -- the remedy for which is the punishment of those directly involved, not condemnation of an entire religious movement.

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11 The alleged "experiences" of the amicus states are not part of the record in the instant action, concern totally different individuals, and, in any event, are subject to the same infirmities as the Minnesota complaints, revealing more a series of misunderstandings and faulty communications than intentional frauds (as when a fairgoer assumed that literature was being offered to him without charge and a contribution was subsequently sought). They fall far short of meeting the beyond-a-reasonable-doubt standard required to prove a crime, and are more than vaguely reminiscent of similar allegations lodged against the Jehovah's Witnesses and other anti-establishment groups in years past.

Petitioners' attempt to prevent fraud by the outright prohibition on itinerant solicitation contained in the booth rule offends the Constitution in several ways:

1) It punishes law-abiding members of ISKCON for the alleged unlawful activities of a few, an impermissible form of guilt by association, even if the allegations were proven true. As the Fifth Circuit held in condemning an airport regulation which would revoke the solicitation permit of any organization if three or more of its members were convicted of violating the airport regulation;

> the . . . restriction on organization merely conjoins . . . [a prior restraint] with one of guilt by association; sinners, apparently, flock together. This generalization is, at best, equally weak. It cannot support a prior restraint either. The penalty provision is unconstitutional.

ISKCON v. Eaves, 601 F.2d at 833.

And, as Judge Higginbotham held in ISKCON v. State Fair of Texas, 461 F. Supp. at 723, the fair's

> legitimate concern with preventing fraud and theft cannot justify a rule which prohibits all devotees from practicing Sankirtan in a public forum.

2) It presumes that a few isolated instances of misconduct permit the state to infer that a pervasive and predictable pattern of conduct has been proven, one which gives Petitioners the right to punish or restrain behavior prior to its occurrence.

> The ordinances operate as a prior restraint on the exercise of speech, restraining its exercise in advance of its invocation based upon the finding that the speech engaged in will be fraudulent.

ISKCON v. Kearnes, 454, F. Supp. 116, 119 (E.D. Cal. 1978).

> [W]e do not think that the ease of administrating the 'booth rule' and the avoidance of future litigation are considerations which save the rule. The law seems certain that considerations of this sort may not be permitted to

> invade the proper exercise of a First Amendment right.

ISKCON v. Bowen, 600 F.2d at 669-70.

3) It unconstitutionally deprives all groups at the Fair of their First Amendment rights, including organizations against whom no charge of fraudulent conduct has ever been made. Particular instances of misconduct cannot serve as the basis for a regulation which would abridge the First Amendment rights of all. Near v. Minnesota, 283 U.S. 697, 720 (1931); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975).

4) It impermissibly makes the loss of First Amendment rights the punishment for criminal activity.

> It has never been suggested that the deprivation of first amendment rights may be used as a punishment for an offense . . .

ISKCON v. Eaves, 601 F.2d at 833 n.28

5) And the booth rule is far broader than necessary to curtail fraud. The proper method is criminal prosecution after the fraud takes place. "Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly". Village of Schaumberg, supra, 444 U.S. at 637, Accord, e.g., Cantwell v. Connecticut, 310 U.S. 296, 306. Schneider v. New Jersey, 308 U.S. at 164. Petitioners condemn this as "simplistic and impractical" (P.B. 27), but it is the constitutional way in our democracy.[12]

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12 If identification is a problem in undertaking such prosecution, the Fair could arguably require an itinerant solicitor to wear a badge to "establish his identity and his authority to act for the cause which he purports to represent." Cantwell v. Connecticut, supra, 310 U.S. at 306;
(Footnote Continued)

As the Court declared in Schneider, supra, 308 U.S. at 164.

> Frauds may be denounced as offenses and punished by law. . . . If it is said that these means are less effective and convenient . . . the answer is that consideration of this sort do not empower municipality to abridge freedom of speech and press.

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12 (Footnote Continued)

Hynes v. Mayor of Oradell, 425 U.S. 610, 618-619 (1976), Martin v. Struthers, 319 U.S. at 148 n.14. But see Talley v. California, 362 U.S. 60 (1960). Since petitioners themselves contend that "[t]he booth rule was drafted to enhance the ability of fairgoers to become informed of the identity and purpose of all salespersons" (P.B. 25), they should not be unwilling to utilize a method which directly identifies the solicitor with a minimal infringement on First Amendment rights.

III. WHEN BALANCED AGAINST THE GOVERNMENTAL INTERESTS ALLEGEDLY SERVED BY THE RULE, THE EFFECT ON ISKCON'S CONSTITUTIONAL RIGHTS IS UNDULY SEVERE.

All but the most bountifully-endowed organized religions are dependent upon contributions for their survival. The newer, poorer, and less established the religion, the more keenly its survival depends on unfettered access to potential contributors, and the Hindu denomination of Krishna Consciousness is clearly in this position. (J.A. 10-11.) The power of the Fair officials to prevent or severely hamper the sale of Vedic literature and the solicitation or collection of contributions thus threatens "the very lifeblood and principal means of support of this religious movement." (J.A. 10-11, 24.) Accord, ISKCON v. State Fair of Texas, 461 F. Supp. at 723.

The Krishna Consciousness religion, in

addition to experiencing the financial and organizational problems attendant upon being newly established in this country, is totally dependent on its ability to solicit contributions from outsiders (i.e., non-believers) to a degree not experienced by almost any other religion. The converts to Krishna Consciousness foreswear material possessions and, upon becoming devotees, expend all their time and energy working for the movement and preaching and practicing Krishna Consciousness. (J.A. 32.) The devotees retain no regular sources of income outside the religion which they can draw upon to support their religion. In fact, it can accurately be said that the religion sustains its devotees rather than the reverse. (J.A. 21, 24.) Whereas most members of America's traditional religions hold jobs and earn incomes outside their

churches, and are consequently able to support their churches with contributions from those incomes -- making it unnecessary for most major religions to solicit contributions from the populace at large -- ISKCON must solicit from strangers and seek to win converts to stay alive.

The Minnesota State Fair provides an unequalled opportunity for potentially effective solicitation. In terms of numbers of visitors, there is no gathering or population center in Minnesota even remotely approaching it. During its 12-day duration the Fair attracts 1,320,000 people. (J.A. 35.) That is three times the population of Minneapolis, the state's largest city, and more people than the combined population of Minnesota's 19 largest cities. 1980 Census of Population and Housing (Preliminary), Bureau of the Census, U.S. Commerce Dept.

Accordingly, a mere handful of strategically placed solicitors would be able to approach many times more prospective contributors and potential converts at the Fair than they could anywhere else in the state with equal effort and expense. Restricting them to a booth would thus be an impermissible burden on First Amendment rights.

The right to solicit contributions and sell literature throughout the Fair is also vital to ISKCON because the Fair is

> the kind of forum where devotees may most readily perform Sankirtan, for people in the position of fairgoers are particularly receptive to receiving books and discussing Krishna Consciousness. This is because people in a recreational situation such as a day trip to the Fair have substantial time to spare that would not be available to them on a normal workday and because fairgoers are open to new ideas and different cultural or educational experiences. Beca Affdt., J.A. 11.

Given the relaxed, inquisitive,

unhurried and open mood of most fairgoers, they constitute ideal prospects for solicitations by organizations lacking Community Chest credentials, and it is essential that ISKCON and groups similarly situated have an effective opportunity to solicit them.

People on city streets are often too busy, at sporting events too preoccupied, and at home too wary of strangers and protective of their privacy to be open to solicitations by members of such groups. And the number of citizens found at the Fair is certainly too costly to reach by television or other forms of paid advertising. Thus state fairs serve such groups as truly ideal, unique, irreplaceable forums for the advocacy of beliefs, the distribution of literature, and the solicitation of financial support. In no other forum in the vast majority of our states can one

find such large concentrations of people open to approach by First Amendment groups as are found at state fairs.[13] To deny such groups meaningful access to state fairgoers may deny them a chance for survival. Itinerant solicitation at state fairs, like door-to-door solicitation in an earlier era, "is essential to the poorly-financed causes of little people." Martin v. Struthers, 319 U.S. at 146. And the alleged state interests in enforcing the booth rule against such groups must, in our democracy, be seen as miniscule in comparison.

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13 The total number of visitors to state fairs is huge. The Texas State Fair alone is visited by more than 3,000,000 people each year, ISCKON v. Texas, supra, 461 F. Supp. at 720, and the nation, annually holds more than 2,000 state, district and county fairs, "Fairs", Encyclopedia Brittanica (1970).

IV. CONCLUSION.

Because the operation of the booth rule prohibits or substantially curtails effective exercise of First Amendment rights; because in actual practice the booth rule advances no substantial state interests; and because the state interests implicated by the solicitation activities of religious and political groups can be met by less destructive means, the application of the booth rule to religious and political groups should be found unconstitutional, and the decision of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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